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Supreme Court, U.S.
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No. 98-727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Teresa L. Cunningham,
Petitioner,

v.

Hamilton County, Ohio,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

When may an attorney appeal a sanctions order: (i) not until final judgment (the rule in the Sixth and Tenth Circuits); (ii) immediately, *so long as* she is no longer participating in the case (the rule in the Fifth Circuit); (iii) immediately, *so long as* she is no longer participating *and* the appeal is not intertwined with the merits of the case (the rule in the Third Circuit); (iv) immediately, *so long as* the sanction is "significant" (the rule in the Eleventh Circuit); or (v) immediately, without conditions (the rule in the Second, Seventh, Eighth, and Ninth Circuits, but rejected by the First, Fourth, and Federal Circuits)?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Defendants-Appellees Correctional Medical Systems, Inc., Simon Leis, Sally Remilard, and Joseph Spriggs were parties to the proceedings below.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The magistrate judge's opinions granting Respondent's motion for sanctions (App. 10-12) and setting the amount of sanctions (*id.* at 13-21) are unreported. The district court's opinion affirming (*id.* at 22-32) is unreported. The Sixth Circuit's opinion dismissing Petitioner's appeal for lack of jurisdiction (*id.* at 35-55) is reported at 144 F.3d 418. The Sixth Circuit's order denying rehearing and rehearing *en banc* (*id.* at 56) is unreported.

JURISDICTION

The Sixth Circuit entered its judgment on May 21, 1998. The Sixth Circuit denied rehearing and rehearing *en banc* on August 5, 1998. This Court's jurisdiction is invoked under 28 USC 1254(1).

STATUTORY PROVISION INVOLVED

28 USC 1291 provides in relevant part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT

I. The District Court Sanctioned Petitioner On The Ground That She Committed Discovery Abuses.

A. The Allegations of the Complaint

In the litigation underlying this case, Petitioner, a solo practitioner in Florence, Kentucky, brought a wrongful death action on behalf of Mr. Darwin Starcher. Case No. 1-95-815 (S.D. Ohio). The Complaint sought damages as a result of the

suicide death of plaintiff's son, Casey Starcher (hereinafter "Casey"), while incarcerated in the Hamilton County, Ohio Justice Center. The Complaint named several defendants, including Hamilton County, Ohio, Respondent here. *See* Court of Appeals Joint Appendix ("Ct. App. J.A.") at 022, ¶ 5.[1] The Complaint alleged that the defendants' wrongful failure to place Casey on suicide watch, despite his known depression and history of suicide attempts, made it possible for Casey to kill himself.

The Complaint sets forth a number of allegations regarding Casey's suicide and the defendants' knowledge of Casey's history of suicide attempts while incarcerated. *E.g.*, Ct. App. J.A. at 024-25, ¶¶ 10-14. In particular, on August 3, 1995, Casey was advised that a trial court had denied his motion to withdraw a guilty plea on the charges pending against him. *Id.* at 026, ¶ 19. That same day, an employee of the Justice Center was advised to watch Casey closely in light of his history of suicide attempts and the trial court's unfavorable ruling. *Id.*, ¶ 20. But no employee of the Justice Center checked on Casey from 11:00 p.m. that evening, when he was locked in his cell for the night, until 6:00 a.m. the next morning. *Id.* at 026-27, ¶ 21. At that time, Casey was found dead, with a plastic bag and blanket over his head. *Id.* The Complaint sought damages for Casey's death under 42 USC 1983, as well as under an Ohio statute, O.R.C. 341.01. Ct. App. J.A. 029-30, ¶¶ 35-38.

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[1] Jurisdiction was based on 28 USC 1331, 1343. An Amended Complaint was filed in October 1996. Ct. App. J.A. at 495-507. The allegations of the original and amended complaints are functionally identical for present purposes. But because the sanctions arose while the original complaint was the operative pleading, we cite to it.

B. The Discovery Disputes Giving Rise To Sanctions Against Petitioner

The district court referred the matter to a magistrate judge. App. 1 (docket nos. 3-5). The case then devolved into substantial wrangling over discovery and procedural issues. Two separate sets of defendants moved to disqualify Petitioner on the ground that she was a potential witness in the case. App. 1 (docket nos. 18, 20, 26). In addition, Petitioner's client, the plaintiff, died. After Casey's sister was appointed as a new administrator for his estate, communications with Petitioner were gravely difficult because the administrator lived several hours away and did not have a telephone. Ct. App. J.A. at 234; Pet. C.A. Br. 5, 6.

In the midst of this, discovery commenced, resulting in the two discovery disputes relevant here. Nine days after the defendants served discovery requests, and some three weeks before responses were due, Petitioner advised the defendants that she could not yet prepare full and complete responses because of her inability to communicate with the administrator. App. 37. The defendants, however, displayed little patience, filing a motion to compel on the *first* business day after Petitioner was to file discovery responses. App. 1 (docket no. 10). The magistrate promptly held a hearing on that and eleven other motions already pending. Despite the death of Petitioner's client, the magistrate ordered that Petitioner produce "full and complete" responses to the defendants' interrogatories within two days. Ct. App. J.A. at 095. The magistrate also set a date for the deposition of an individual named Rex Smith. *Id.* at 096.

Soon after the hearing before the magistrate, Petitioner learned that Rex Smith lived in Indianapolis, Indiana and would be available for deposition in that city, but only on a date three days prior to that specified by the magistrate. Ct. App. J.A. 101, 136. Petitioner therefore served a deposition notice for Indianapolis for the date the witness was available. *Id.* at 108-10. Defendants objected that same day, and

Petitioner responded immediately, offering to conduct the deposition on the date specified by the magistrate and otherwise seeking to reach an accommodation. *Id.* at 136 ("If this cannot be worked out, I suggest we contact the Court for a discovery conference."); *id.* at 211-12 ("I said, Mr. Zorn [Respondent's counsel], he's in Indianapolis; he will not come to Cincinnati. Would you like to dispose [sic] Mr. Smith on the 25th in Indianapolis? He said, no, it has to be in your office [in Cincinnati].").

C. The Magistrate's Sanctions Order

When the defendants insisted categorically that the deposition notice be withdrawn, the parties filed competing motions with the magistrate. Petitioner, on behalf of the plaintiff, moved to compel compliance. App. 10. The defendants responded with four separate, but essentially duplicative, motions to quash and for sanctions. App. 2-3 (docket nos. 30, 31, 32, 34). The day after Petitioner issued the deposition notice, Respondent moved for a protective order prohibiting the deposition from going forward and for "appropriate sanctions." Ct. App. J.A. at 098-112. The next day, another group of defendants filed a parallel motion for a protective order and sanctions based on the deposition notice. *Id.* at 113-41. The same day, the defendants jointly filed yet a third motion arising from the deposition notice, this one moving to quash the notice entirely. *Id.* at 174-89. Respondent specifically maintained that the subpoena contravened both the magistrate's order setting the deposition date and also a "verbal but unrecorded understanding of the Court and all counsel that [the deposition] would be taken at the office of plaintiff's counsel here in Cincinnati." *Id.* at 098. The defendants in addition maintained that the interrogatory responses prepared by Petitioner after the previous order of the magistrate remained inadequate. *Id.* at 142.

Two days later, the magistrate held a hearing on the motions. Petitioner, however, did not receive the defendants' motions until approximately two hours before the hearing. Ct. App. J.A. at 270, 272. Even then, she could not review the papers but instead had to appear before another judge. *Id.* At the hearing, the magistrate granted the defendants' motions to quash and for a protective order and denied the plaintiff's motion to compel. Because the magistrate found that Petitioner had violated its earlier order, it also granted the defendants' motions for sanctions. App. 11.

The magistrate directed the defendants to submit specific requests for sanctions "indicating their reasonable fees and expenses for their court appearance on these motions and their preparation for today's hearing." App. 11. Petitioner subsequently objected to the sanctions award, as the magistrate recounted:

> Plaintiff's responses (Doc. 52 and 53) set forth objections to the Court's order of sanctions and award of attorney's fees and to the amounts claimed by defendants' counsel, respectively. It is argued that plaintiff's counsel was denied due process because she didn't have adequate time to prepare a defense; that the time claimed by Attorney Hurley [Correctional Medical System's counsel] is exaggerated; that the defendants' motions are duplicative; that the hourly rate claimed by Attorney Hurley is excessive; that the time claimed by Attorney Zorn [Respondent's counsel] is exaggerated and that the hourly rate claimed by Attorney Zorn is excessive.

Id. 18. The magistrate agreed to deduct 1.31 hours from the time claimed by Respondent's counsel but otherwise rejected Petitioner's objections to the sanction. The magistrate therefore directed that Petitioner pay Respondent $1494.[2]

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[2] The $1690.50 figure cited by the Sixth Circuit (App. 40) is not correct. The court also ordered Petitioner to pay other

Finding "the conduct of plaintiff's counsel to be egregious," the magistrate ordered that the sanctions be paid "forthwith" and refused to enter a stay pending appeal. *Id.* at 20-21.

D. The District Court's Order Affirming The Sanctions

Petitioner filed objections to the sanctions with the district court. Ct. App. J.A. at 277-413. Petitioner contended that she had made all reasonable efforts to comply with the magistrate's scheduling order and that the magistrate had failed to provide her an opportunity to prepare a defense. *Id.* at 285-86. Petitioner furthermore argued that the "hourly rates of defense counsel are inflated" and encompassed "duplicated work." *Id.* at 472. In the event that the district court disagreed, Petitioner sought a stay of the enforcement of the award pending appeal, explaining that Respondent already was attempting to collect the award. *Id.* at 471. The district court disagreed with Petitioner and affirmed the sanctions on October 22, 1996. App. 31. In the same order, the district court disqualified Petitioner as counsel to the plaintiff on the ground that she would be a witness in the case, and she subsequently was deposed. *Id.* at 30; App. 5-6 (docket no. 127) The court did not stay the sanctions.

On November 1, Petitioner filed a notice of appeal "from the decision issued by Judge Beckwith on October 22, 1996 affirming magistrate James Cook's imposition of sanctions." C.A. App. at 043; *see also* FRAP 3. In the district court, Petitioner then filed a "Motion To Stay Collection Of Sanctions Pending Appeal." App. 6 (docket no. 133); FRAP 8(a). In this motion, Petitioner explained:

> Teresa Cunningham moves this Court for an order staying collection of sanctions imposed in this matter on October 22, 1996. Ms. Cunningham, feeling aggrieved by the order, has appealed to the Sixth Circuit Court of Appeals from the Order. . . . If the appeal is granted, it would be difficult for Ms. Cunningham to recover the monies paid to the defendants.

Petr's Motion To Stay Collection of Sanctions Pending Appeal at 1-2. The district court subsequently granted the stay and Respondent accordingly has not collected the sanction. App. 6 (docket no. 138).

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defendants attorney's fees as sanctions, which later were settled. *Id.* at 8 (docket nos. 200, 216, 217).

While the sanctions were on appeal, the proceedings continued in the district court without delay. Discovery continued on both sides and a variety of motions were filed. Just under a year after Petitioner appealed, the district court entered summary judgment in favor of the defendants on the federal claims, and dismissed the remaining state law claims without prejudice. App. 7 (docket no. 187). The plaintiff appealed to the Sixth Circuit. *Id.* at 8 (docket no. 190). Petitioner, whose appeal of the sanctions order still was pending before the Sixth Circuit, did not file a separate notice of appeal from the final judgment.

II. The Sixth Circuit Dismissed Petitioner's Appeal For Lack Of Jurisdiction.

A. The Majority Opinion

Petitioner's appeal to the Sixth Circuit raised the same contentions as her objections filed with the magistrate and district court. A divided panel of the Sixth Circuit, however, dismissed Petitioner's appeal for lack of jurisdiction, acknowledging that it was "sympathetic to [her] plight." App. 42-43. The majority recognized that a substantial majority of circuits would find appellate jurisdiction on these facts (Pet. for Cert. at 12-16). It furthermore recognized that this Court in *Alexander v. United States*, 201 US 117 (1906), held that a third party may disobey a discovery subpoena and appeal

immediately if punished by the court. The majority below recognized that "*Alexander* remains the general rule governing appeals from discovery orders" and furthermore that "[t]he Supreme Court's adherence to the *Alexander* procedure for obtaining appellate review of discovery orders has been unswerving," but it nonetheless refused to follow *Alexander* on the ground that the rule of that case applies only when a district court enters a finding of civil contempt. *Id.* 41-42.

The majority concluded that this case is controlled by the three-part test of appealability derived from *Cohen v. Beneficial Industrial Loan Co.*, 337 US 541 (1949). Under the "*Cohen* doctrine," an immediate appeal is permitted notwithstanding the absence of a final judgment, from orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546.

The majority concluded that attorney sanctions orders do not satisfy the second *Cohen* criterion because "the issues presented by an appeal such as [Petitioner's]" could not "be deemed completely separate from the merits of the underlying case." App. 45. The majority reasoned that,

> Cunningham provided responses to at least some of the defendants' discovery requests, and presumably her challenge to the district court's Rule 37 [sanctions] order would be that her responses were sufficient at the time they were provided. To resolve such a debate, we would be required to consider, among other things, the available evidentiary support for each of many specific contentions questioned by the defendants. This process would differ only slightly from an inquiry into the merits.

Id. at 45.

The majority furthermore refused to attribute any significance to the fact that, at the time Petitioner appealed, she was not serving as counsel in the case. The Sixth Circuit believed it "would be strange if the fact of disqualification permitted an attorney to take an immediate appeal of a discovery order, but did not permit an immediate appeal of the disqualification order itself" under *Richardson-Merrell, Inc. v. Koller*, 472 US 424 (1985). App. 47. The majority also foresaw "serious administrative problems" with determining whether the time to appeal should run from the sanctions order or instead the date of the attorney's withdrawal from the case. *Id.* 47.

The majority contemplated that a sanctioned attorney would appeal at the end of the case, but acknowledged that such an appeal was a practical impossibility here. App. 42. The district court entered its final judgment while Petitioner's appeal from the sanctions order still was pending before the Sixth Circuit. Petitioner therefore did not appeal from the final judgment. Under the court of appeals' holding, Petitioner thereby forfeited entirely her ability to contest the sanctions against her. *See* App. 4-7 (docket entries 99 (magistrate judge order of 9/25/96 imposing sanctions); 127 (district court order of 10/22/96 affirming sanctions); 133 (Petitioner's notice of appeal dated 11/1/96); 187 (final judgment dated 10/9/97)).

B. The Dissent

Judge Moore dissented, explaining that the sanctions order and Petitioner's appeal were not "intertwined with the merits" of the underlying case. Contrasting the majority's view that "presumably" Petitioner's appeal would turn on the nature of the evidence in the case, Judge Moore detailed the *actual* claims raised by Petitioner:

> Cunningham raises far different challenges to the sanctions order. Her arguments against the sanctions order are that she did not have enough time to answer

> the interrogatories, she had to depose Smith in Indianapolis, and she did not receive sufficient notice in order to prepare for the sanctions hearing. None of these arguments against the sanctions order involve the substance of the discovery itself.

Id. at 51. Resolving these contentions, the dissent explained, "would not compel us to address the merits of the underlying action." *Id.* at 51.

Judge Moore also would have held that an immediate appeal may be brought by an attorney no longer participating in the case, noting that a number of circuits "have found this distinction persuasive." App. 51. At the very least, according to Judge Moore, the majority's decision would result in a "patently obvious" "inequity" by depriving Petitioner of any opportunity to appeal. *Id.* 54.

SUMMARY OF THE ARGUMENT

The sanction imposed upon Petitioner is immediately appealable under the "*Cohen* doctrine." First, the order finally determined the sanction, a point the majority below did not dispute. Indeed, Petitioner was subject to Respondent's right to require payment of the sanction. Second, an attorney sanction is "collateral to the merits," as this Court squarely held in two decisions the Sixth Circuit ignored. *Willy v. Coastal Corp.*, 503 US 131, 137 (1992); *Cooter & Gell v. Hartmarx*, 496 US 384, 395-96 (1990). Third, the sanction was effectively unreviewable on appeal from the final judgment because Petitioner was not a party to the suit and therefore was *prohibited* from appealing the final judgment. *Marino v. Ortiz*, 484 US 301, 304 (1988) (per curiam) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment is well settled.").

A holding that Petitioner properly appealed from the sanctions order will not interfere with district courts' orderly

administration of their proceedings. Here, the district court entered the sanction conclusively, rendering it immediately executable. Because Petitioner could not appeal the final judgment, she had to appeal directly from the sanction or not at all. If the district court instead had chosen to merge the sanction into the final judgment or to finalize the sanction at the end of the case, Petitioner could have and would have waited to appeal. District judges thus have it within their discretion to impose – and parties have it within their discretion to request – immediately executable sanctions that may be appealed upon entry or instead sanctions that will not be final and appealable until the end of the case. Under the holding of the Sixth Circuit, by contrast, attorneys *always* must await the end of the case before appealing, even if the attorney must pay a substantial financial sanction immediately and the case may not conclude for years.

ARGUMENT

Congress provided in 28 USC 1291 that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."[3] The term "final decision" has two components. "The requirement of finality precludes consideration [1] of decisions that are subject to revision, and [2] even of "fully consummated decisions [that] are but steps towards final judgment in which they will merge.'" *Behrens v. Pelletier*, 516 US 299, 305 (1996) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 US 541, 546 (1949)) (third alteration in original). Appeal thus generally must await the "decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Van Cauwenberghe v.*

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[3] The statute does not apply if the final decision otherwise may be appealed directly to this Court. 28 USC 1291.

Biard, 486 US 517, 521 (1988) (quoting *Catlin v. United States*, 324 US 229, 233 (1945)).

In a long line of decisions, this Court nonetheless has permitted immediate appeals from various interlocutory district court orders, deriving a three-part test from *Cohen v. Beneficial Industrial Loan Corp.*, 337 US 541 (1949). "First, the order must 'conclusively determine the disputed question.' Second, the order must 'resolve an important issue completely separate from the merits of the action.' Third and finally, the order must be 'effectively unreviewable on appeal from a final judgment.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 US 271, 276 (1988) (citations and quotations omitted). This test "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a "practical construction' of it." *Digital Equip. v. Desktop Direct*, 511 US 863, 867 (1994).

All three elements of the *Cohen* doctrine are met in this case.

I. Immediate Appeals Of Attorney Sanctions Orders Satisfy The Three *Cohen* Criteria.

A. The District Court's Sanctions Order "Conclusively Resolved" Petitioner's Liability For Sanctions.

The majority below acknowledged that "the first *Cohen* factor," the appealed-from order must conclusively determine the disputed question, "is satisfied here." App. 43. That conclusion is inescapable. The sanctions order was definitive and immediately executable. The magistrate judge imposed the sanction upon Petitioner and the district judge affirmed. Neither gave any indication that they contemplated revisiting the matter at a later date. As a result, Petitioner "conclusively" was obligated to pay Respondent a sanction of $1494. The district specifically did not enter a stay at that time, despite Petitioner's express request.

After Petitioner appealed, the district court entered a stay of collection, but that makes no difference. District courts

frequently impose stays while cases are on appeal, as Federal Rule of Appellate Procedure 8 expressly contemplates. But once the appeal has been lodged, such a stay can not retroactively render the appealed-from order nonfinal.

Nor does the district court's inherent authority to revise or amend the sanction render it nonappealable. This Court has "contrasted two kinds of nonfinal orders: those that are 'inherently tentative' and those that, although technically amendable, are 'made with the expectation that they will be the final word on the subject addressed.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, *supra*, 485 US at 277 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 US 1 (1983)). The former are appealable; the latter are not. *Id.* Thus, an order determining that a defendant is not entitled to qualified immunity is appealable under the *Cohen* doctrine, despite the fact that the district judge could change her mind at a later date. *Johnson v. Jones*, 515 US 304, 312 (1995). Similarly, unless the district court itself indicates that the sanction is tentative, the order remains appealable notwithstanding that the district judge conceivably could modify it at a later date.

B. The District Court's Sanctions Order Resolved An Important Question That Is Completely Separate From The Merits Of The Case.

The court of appeals held that attorney sanctions orders are not immediately appealable because, contrary to the second element of the *Cohen* test, they do not resolve an important question completely separate from the merits. The majority did not doubt that the sanction raised a sufficiently "important" question. Instead, it viewed Petitioner's appeal as impermissibly intertwined with the merits. App. 45.

The court of appeals' decision squarely conflicts with two decisions of this Court, which hold that attorney sanctions are collateral to the merits of the underlying litigation. *Cooter &*

Gell v. Hartmarx Corp., 496 US 384 (1990), held that attorney sanctions may be imposed after the action is dismissed precisely because they are collateral to the merits. In that decision, the Court first traced its earlier precedents holding that requests for attorney's fees are collateral to the merits:

> It is well established that a federal court may consider collateral issues after an action is no longer pending. . . . This Court has indicated that motions for costs or attorney's fees are "independent proceedings supplemental to the original proceeding and not a request for modification of the original decree." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170 (1939). Thus, even "years after the entry of a judgment on the merits" a federal court could consider an award of counsel fees. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451 n.13 (1982).

Id. at 395-96.[4] The Court then explained that the same holds true of requests for sanctions:

> Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.

Id. at 396. Similarly, in *Willy v. Coastal Corp.*, 503 US 131, 137 (1992), the Court relied on *Cooter & Gell* to hold that district courts may impose sanctions even after dismissing the

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[4] *See also Budinich v. Becton Dickinson & Co.*, 486 US 196, 199-200 (1988) ("As a general matter, at least, we think it is indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain."); *FCC v. League of Women Voters*, 468 U.S. 364, 373 (1984) ("whether appellees were entitled to recover attorney's fees and costs" is a "wholly collateral issue"); *Trustees v. Greenough*, 105 U.S. 527, 531 (1881).

underlying action for lack of subject matter jurisdiction because, once again, sanctions are "collateral to the merits."

This Court's conclusion that attorney sanctions orders are collateral to the merits is borne out by this case. The magistrate judge evaluated the discovery requests promulgated by Respondent as well as the magistrate's own order scheduling depositions. The magistrate then considered whether Petitioner had followed the scheduling order and submitted sufficient discovery responses. Finding that she had not, the magistrate concluded that Respondent was entitled to a certain amount in attorney's fees based on Petitioner's failure to abide by discovery rulings. In doing so, the magistrate applied a legal standard, and evaluated a legal question, that do not touch in any respect on Respondent's liability for Casey's death.

The Sixth Circuit's contrary view reads *Cohen*'s reference to appeals that are "intertwined with the merits" to mean that no immediate appeal may be taken from any district court order that overlaps with the parties' substantive claims. That exceptionally restrictive view of appealability is not correct. The purpose of the separability requirement is to ensure "that review now is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once, and also seems less likely to delay trial court proceedings (for, if the matter is truly collateral, those proceedings might continue while the appeal is pending)." *Johnson v. Jones*, 515 US 304, 311 (1995). But many district court orders that relate to the merits can be appealed without resulting in duplicative review or stays of the district court proceedings.

This Court accordingly has *rejected* the more narrow view expressed by the Sixth Circuit in this case that "any factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of immediate appealability." *Mitchell v. Forsyth*, 472 US 511, 529 n.10 (1985). Even if an order is "practically intertwined with the merits," it is

appealable if it "nonetheless raises a question that is significantly different from the questions underlying [the] plaintiff's claim on the merits." *Johnson v. Jones*, *supra*, 515 US at 314 (emphasis added). Thus, "the *Cohen* 'separability' component asks whether the question to be resolved on appeal is '*conceptually distinct from the merits of the plaintiff's claim*.' The appropriate comparison, then, is between the decision sought to be reviewed and the claim underlying the action itself." *Behrens v. Pelletier*, 516 US 299, 309 n.3 (1996) (quoting *Mitchell v. Forsyth*, *supra*, 472 US at 527) (emphasis added).

The court of appeals' failure to apply the correct legal standard is plain from several of this Court's precedents. For example, in permitting appeals from the denial of qualified immunity, the Court has acknowledged that "the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief." *Mitchell v. Forsyth*, 472 US 511, 528 (1985). The Court in fact emphasized that "the same is true" with regard to other immediately appealable orders, such as "when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause." *Id.* Similarly, a district court's decision to stay or remand a case pending state court litigation is immediately appealable, despite the fact that such a decision involves a substantial analysis of the facts of the case. An immediate appeal is permitted because, notwithstanding this inquiry into the facts, the district judge resolves the separate question "whether the federal court should decline to exercise its jurisdiction in the interest of comity and federalism." *Quackenbush v. Allstate Ins. Co.*, 517 US 706, 714 (1996).

The separateness of a sanction from the merits strongly counsels in favor of permitting immediate appeals. An immediate appeal will not "waste judicial resources by

requiring repetitive appellate review of substantive questions in the case." *Van Cauwenberghe v. Biard*, 486 US 517, 527-28 (1988). Nor is there any realistic chance that the attorney will become less likely to seek appellate review as the case proceeds to final judgment, thereby rendering the issue "moot or irrelevant by the end of trial." *Stringfellow v. Concerned Neighbors In Action*, 480 US 370, 380 (1987). The sanction order is imposed upon the attorney personally, and the calculus of the risks and benefits of appeal will not be changed by a decision on the merits.

C. The District Judge's Sanction Order Was "Effectively Unreviewable" On Appeal From The Final Judgment.

The Sixth Circuit only briefly discussed the third element of the *Cohen* doctrine: that the district court's order be "effectively unreviewable" on appeal. According to the majority opinion, Petitioner should have and could have filed her notice of appeal from the final judgment later entered in the underlying case. App. 48. That is not correct. Petitioner could not appeal the final judgment because she was not a party to the case and the judgment did not otherwise operate upon her. The Sixth Circuit's holding that Petitioner could not appeal directly from the sanction thus means that she could not appeal at all, which cannot be the law.

1. Only Parties May Appeal A Final Judgment.

"The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 US 301, 304 (1988) (per curiam) (citing *United States ex rel. Louisiana v. Jack*, 244 US 397, 402 (1917); FRAP 3(c) ("The notice of appeal shall specify the party or parties taking the appeal.")). In *Marino v. Ortiz*, for example, the Court unanimously concluded that a group of white police officers who had not intervened in the district court could not appeal the entry of a consent decree

resolving a discrimination suit. In *Karcher v. May*, 484 US 72 (1987), the Court unanimously concluded that legislators could not appeal a district court's judgment individually when they had participated in the district court only in their official capacities. As Justice O'Connor's opinion for the Court in the *Karcher* case explains, "we have consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." *Id.* at 77.

This is not to say that only the persons named in the caption of the judgment may appeal. But the appellant must be the equivalent of a litigant, *i.e.*, she must have "participated as if [a] part[y]." 15 Wright et al., *Federal Practice & Procedure*, § 3902.1; *id.* ("Most of these appeals involve persons who participate in trial court proceedings as if they had intervened, and who seem to have been treated on all sides as de facto parties.") Thus, in *Williams v. Morgan*, 111 US 684, 698-99 (1884), the Court recognized that "quasi parties" who, "incidentally interested in some branch of a cause have been allowed to intervene for the purpose of protecting their interest, and even to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below." Similarly, *Blossom v. Milwaukee RR Co.*, 68 US (1 Wall.) 655, 656 (1863), recognized that "other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders." *See also Kneeland v. American Loan & Trust Co.*, 136 US 89, 93-94 (1890); *Hovey v. McDonald*, 109 US 150, 155 (1883); *Hinckley v. Gilman, Clinton, & Springfield RR Co.*, 94 US 467, 469 (1876).

The rule against nonparty appeals has existed for as long as the "final judgment" rule itself. As we discuss further below, the Court in 1857 held that a party's attorney may not appeal from the final judgment. *Platt v. Jerome*, 60 US (19

How.) 384. Subsequently, in *United States ex rel. Louisiana v. Jack*, 244 US 397 (1917), the Court explained:

> With exceptions not even remotely applicable to a case such as we have here it has long been the law as settled by this court that "no person can bring a writ of error [an appeal is not different] to reverse a judgment who is not a party or privy to the record," *Bayard v. Lombard*, 9 How. 530, 551, and in *Ex parte Tobacco Board of Trade*, 222 U.S. 578, it was announced, in a per curiam opinion, as a subject no longer open to discussion, that "one who is not a party to a record and judgment is not entitled to appeal therefrom" . . . .

Id. at 402 (insert in original); *accord International Union v. Scofield*, 382 US 205, 208-09 (1965); *Elwell v. Fosdick*, 134 US 500, 513 (1889); *Ex Parte Cockroft*, 104 US 578, 578-79 (1881); 15A Wright et al., *Federal Practice & Procedure*, § 3902.1 (1992 ed.) ("The basic rule that a nonparty cannot appeal the judgment in an action between others is well established.").

The bar to nonparty appeals thus qualifies the general rule that an appeal may be brought only from a final judgment. "The statutory requirement of a 'final decision' means that '*a party* must ordinarily raise all claims of error in a single appeal following final judgment on the merits.'" *Richardson-Merrell v. Koller*, 472 US 424, 429-30 (1985) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 US 368, 374 (1981)) (emphasis added). Thus, "the final-judgment rule requires that except in narrow circumstances in which the right would be 'irretrievably lost' absent an immediate appeal, *litigants* must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review." *Van Cauwenberghe v. Biard*, *supra*, 486 US at 524 (emphasis added) (citation omitted); *accord Quackenbush v. Allstate Ins. Co.*, 517 US 706, 712 (1996); *Digital Equip. Corp. v. Desktop Direct*, 511 US 863, 867 (1994).

2. Nonparties, Such as Petitioner, May Appeal Only Those Orders Punishing Them Directly.

The Sixth Circuit's decision that Petitioner could not appeal directly from the sanction order has the effect of preventing her, as a nonparty, from appealing at all. But that cannot be the law. If a nonparty may not appeal from the final judgment, she must be permitted to appeal directly from orders, such as sanctions, which impose direct burdens and are not incorporated into the final judgment.

Such nonparty appeals clearly are not prohibited by 28 USC 1291, which establishes jurisdiction over every "final decision" of the district courts without regard to whether the decision is directed to a litigant. Nor is there a policy reason for prohibiting nonparty appeals. District courts have expansive authority to command actions by nonparties within their jurisdiction, including through orders that impose substantial and immediate burdens. *E.g.*, *United States Catholic Conference v. Abortion Rights Mobilization*, 487 US 72 (1988) (addressing daily fine of $50,000 imposed on third party for failure to produce documents). If only parties could file an appeal, such orders would be unreviewable and great injustice could result. On the other hand, frequent appeals by third parties, for example contesting the issuance of subpoenas, could disrupt the orderly progress of trial court proceedings.

This Court's precedents balance these competing considerations. Most district court orders to third parties involve discovery requests. It is settled that a nonparty, like a party, has no right to appeal from a mere discovery subpoena. But unlike a party,[5] if a nonparty refuses to produce materials as ordered by the court, she may incur punishment by the court

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[5] *See Fox v. Capital Co.*, 299 US 105 (1936) (civil contempt not appealable by party); *Doyle v. London Guarantee & Accident Co.*, 204 US 599 (1907) (same).

and then challenge the order in an immediate appeal.[6] Thus, this Court held in *Alexander v. United States*, 201 US 117 (1906):

> [A subpoena] may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case. . . . *This power to punish being exercised the matter becomes personal to the witness and a judgment as to him.* Prior to that the proceedings are interlocutory in the original suit.

201 US at 121-22 (emphasis added). The majority below specifically acknowledged the holding of *Alexander* but held that *Alexander* is limited to instances in which the third party specifically is cited for contempt. App. 41-42.

The Sixth Circuit's narrow view of *Alexander* is incorrect. *Alexander*'s statement that a finding of "contempt" against a third party is appealable (201 US at 121), was not intended to distinguish contempt from other sanctions. At the time *Alexander* was decided, the Federal Rules of Civil Procedure, including their provisions for sanctions, had not yet been enacted. Instead, a finding of contempt illustrated why the Court permitted appeals from district court orders exercising

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[6] Of course, the normal rules of finality continue to apply. The court's order is appealable only if it is definite: "So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Cohen v. Beneficial Indus. Loan Corp.*, 337 US 541, 546 (1949). In addition, the order must be unrelated to the merits of the case such that it will not "merge" into the final judgment. *Behrens v. Pelletier*, 516 US 299, 305 (1996).

the "power to punish," but not from mere subpoenas. There is no question that a sanction upon an attorney similarly is an exercise of the "power to punish" and furthermore is "personal to the" attorney.

Two other cases decided in the same period demonstrate that *Alexander*'s holding extends beyond appeals of contempt sanctions. *Webster Coal & Coke Co. v. Cassett*, 207 US 181 (1907), refused to permit an appeal from an order directing third parties to produce various documents. As in *Alexander*, the Court concluded that an appeal would be permitted if the third parties disobeyed and were punished. But *Webster Coal* made clear that the right to appeal arose from the "independent" nature of the proceeding against the third party, not a finding of "contempt":

> The order as to [the third parties] was purely interlocutory, not imposing penalty or liability, and not finally disposing of an independent proceeding.
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> * * * *
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> This order [to produce] affected the plaintiff and defendant in the case itself, and not the [third parties] as individuals at all, and if the court had power to punish disobedience or enforce compliance then the order prior to such action on the part of the court was clearly interlocutory in the suit.
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> * * * *
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> There was here no attachment for contempt, no judgment on default, and no independent and collateral proceeding, the order disposing of which could be considered as a final decree.

Id. at 186-87.

The Court applied another rationale to reach the same result in *Bessette v. W.B. Conkey Co.*, 194 US 324 (1904). There, the Court permitted an appeal by a third party who had been fined $250 for contempt of court. But *Bessette*, like

Alexander, did not turn on any characteristic unique to contempt proceedings. Instead, the Court permitted an immediate appeal because any appeal from the "final decree" in the case "would not have brought up the proceeding against the petitioner, for he was not a party to the suit." *Id.* at 329. The same principle applies here, as Petitioner was not a party to the underlying suit and accordingly could not appeal from the final judgment.

Although the Court has reiterated that a finding of contempt suffices to trigger a third party's right to appeal (*United States Catholic Conf. v. Abortion Rights Mobilization*, 487 US 72, 76 (1988)), it never has held that a contempt is required. To the contrary, *United States v. Ryan* refused to permit a third party to appeal from a grand jury subpoena, explaining that if "the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt *or similar proceedings* are brought against him." 402 US 530, 532 (1971) (emphasis added). Sanctions and contempt certainly are sufficiently "similar" for these purposes, as both give rise to collateral proceedings that cannot be appealed by the third party upon the entry of a final judgment.

Moreover, there is no practical reason to permit appeals of contempt citations, but not sanctions. In both instances, the district court imposes a fine for failure to obey the court's rules. Nor are the issues in an appeal from a contempt order narrower or less related to the merits of the underlying proceeding. In point of fact, both can arise from the *identical* conduct. Thus, FRCP 37(b)(2) provides that the identical failure to adhere to a discovery ruling, may trigger a finding of "contempt of court" or an order requiring payment of "reasonable expenses, including attorney's fees." No consideration underlying this Court's finality jurisprudence justifies permitting an appeal in the former instance but not the latter.

In point of fact, there is a vital reason not to require an attorney to place herself in contempt of court before appealing. Such a rule would create a grave conflict of interest. The attorney would have a substantial, personal incentive to defy the judge's ruling and incur a contempt sanction in order to secure a right to appeal. But by purposefully engaging in contempt of a binding court order, the attorney breaches her own obligations to the court and also potentially prejudices her client in the eyes of the judge.[7]

3. Attorneys Are Nonparties For Purposes Of The Right To Appeal.

Attorneys are "nonparties" for purposes of determining whether they must appeal from the final judgment or instead directly from a sanctions order. An attorney is not subject to the final judgment. Instead, she serves as a officer of the court in the proceedings and, absent an express provision to the contrary, is not subject to the judgment, which cannot be executed against her. The judgment has no collateral estoppel effect upon the attorney or other clients of the attorney who were not involved in the case. With respect to the finality of the judgment, therefore, the attorney is no different than any other third party.

Nor is the attorney a proxy for her client. Thus, *Platt v. Jerome*, 60 US (19 How.) 384, 385 (1857), held that a plaintiff's attorney could not maintain an appeal that had been dismissed pursuant to a settlement between the parties:

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[7] An immediate appeal vindicates two other interests that are not "effectively unreviewable" after the final judgment. Sanctions, which are designed precisely to highlight the attorney's failure to fulfill her professional and ethical responsibilities to the court, have an immediate, stigmatic effect that the attorney must bear throughout the case. In addition, particularly when large sums are involved, the attorney may be unable to secure repayment if the sanction is reversed on appeal after a substantial delay.

> The attorney . . . . is not a party to the suit, nor does he stand in the place of the party in interest. He is in no way responsible for the costs of the proceedings, and to permit him to control them would, in effect, be compelling the client to carry on the litigation at his own expense, simply for the contingent benefit of the attorney.

Similarly, the Court will not permit an attorney to a party to appeal on behalf of a third party. Thus, *United States ex rel. Louisiana v. Jack*, *supra*, 244 US 397, held that the Attorney General of Louisiana could not appeal on behalf of the State from a judgment in which he had represented a state instrumentality. The reverse is true as well: a party may not appeal an order entered against his attorney. *Grant & Burlingame v. United States*, 227 US 74, 78.

Where, as here, the sanctioned attorney no longer is serving as counsel in the underlying litigation, she certainly cannot be characterized as a "party" for purpose of appeal. An attorney who has withdrawn or been disqualified has no right whatsoever to control or to participate in the suit. Of particular concern, the case may settle entirely without the sanctioned attorney's knowledge, defeating the attorney's right to appeal. No final judgment ever may be entered, rendering an appeal impossible. Alternatively, the attorney may be unaware of the settlement at the time it is entered, and therefore may fail to file a notice of appeal in time through no fault of her own.

II. Immediate Appeals Of Attorney Sanctions Orders Are Consistent With The Policies Underlying The Final Judgment Rule.

A. The District Court Retains Discretion Over The Course Of The Proceedings And Specifically Over Whether An Immediate Appeal Will Be Permitted.

Permitting an immediate appeal on these facts will in no way deprive district courts of control over either the

administration of their proceedings or the ability of the attorneys to take such an appeal. If, as here, the district court conclusively imposes an immediately executable separate sanction without regard to its later entry of the final judgment or some further determination of the sanction, the order is immediately appealable. But the district court can determine instead that the sanction will be incorporated into the final judgment to be enforceable at that time. In that instance, the attorney will not be subject to execution on a sanction order prior to final judgment, but instead will be a party to the final judgment with a right to appeal from it. Alternatively, the district court can state that the amount of the sanction will be finalized at the close of the case, at which time the attorney can appeal from the sanction order. The court of appeals, in turn, has the option of consolidating any appeal by the attorney with the parties' appeal(s) on the merits. *See* FRAP 3(b).

Petitioner's view is consistent with both this Court's precedents and the practice of several circuits. This Court has long cautioned that district courts generally should refrain from entering interim money judgments while a suit remains in progress. Thus, as early as *Forgay v. Conrad*, 47 US (6 How.) 201 (1848), the Court held that an order requiring the immediate transfer of property or payment of money to a party was an appealable "final decree," explaining:

> And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent . . . .

Id. at 204. The Court took care to explain, however, that the right to appeal arose only because the district court had entered a separate, executable decree rather than permitting execution at the end of the case. It emphasized that district court orders

requiring immediate payment in the middle of the case were themselves inconsistent with the "final judgment" rule and therefore should be avoided:

> We, however, feel it our duty to say that we cannot approve of the manner in which this case has been disposed of by the decree. In limiting the right of appeal to final decrees [the predecessor language to § 1291], it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit; and to have the whole case and every matter in controversy in it decided in a single appeal....
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> .... It is *exceedingly important*, therefore, that the Circuit Courts of the United States, in framing their interlocutory orders, and in carrying them into execution should . . . abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order.

Id. at 205 (emphasis added).

Well reasoned decisions of the courts of appeals favor this approach in the context of attorney sanctions awards. Thus, the Fourth Circuit in *Wheeler v. Anchor Continental*, 622 F.2d 94 (1980) (per curiam), remanded an interlocutory sanction order against the plaintiff's counsel. The court explained that

> absent some special circumstances, any award of attorney's fees prior to final judgment in any case should generally await the termination of the case on the merits, and that any appellate review of such an award should only be had in connection with the review of the final judgment in the case. Such a procedure avoids the interruptions that generally result from interlocutory appeals.

Id. at 95. Similarly, the Federal Circuit in *View Engineering v. Robotic Vision Sys.*, noted and adopted the uniform view of the circuits that a district court order announcing an attorney sanction is not appealable until the amount of the sanction is

finally set. 115 F.3d 962, 964 (1997) (collecting cases from the Second, Third, Fifth, Eighth, Ninth, Eleventh Circuits).[8] Judge Easterbrook's opinion for the Seventh Circuit in *Cleveland Hair Clinic v. Puig*, 104 F.3d 123, 125 (1997), reached the same result, noting that *Liberty Mutual Insurance Co. v. Wetzel*, 424 US 737 (1976), "holds that a decision conclusively establishing liability cannot be appealed until all questions about the amount of damages have been resolved."

The approach we suggest thus balances the interests of district courts in administering their proceedings with the interest of attorneys, who are not parties to the action, in appealing orders with immediate and potentially severe consequences. Under the Sixth Circuit's decision, an attorney may be required to pay immediately a sanction in the thousands of dollars or more with no ability to appeal until the case ends years later. That is manifestly unjust. Except in rare instances, no compelling interest requires that the sanction be paid immediately while the right to appeal is deferred indefinitely. When a district court defers the final determination of sanctions, it can make absolutely clear the seriousness of the attorney's misconduct as well as the amount of the sanction contemplated. The effectiveness of attorney sanctions therefore is not undermined when the "conclusive" determination of the sanctions is deferred until the close of the case.

B. Other Practical Considerations Favor Immediate Appeal.

Unlike many of the interlocutory orders that this Court has considered under the *Cohen* doctrine, attorney sanctions orders

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[8] *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 826-27 (7th Cir. 1984), permitted an immediate appeal before the amount of a sanction was finally determined, but only by consolidating appeals from the sanction and the final judgment in the case.

are rarely appealed immediately. Permitting such appeals therefore will not interfere with orderly judicial administration. *See Behrens v. Pelletier*, 516 US 299, 310 & n.4 (1996) (noting, in permitting appeals of the denial of qualified immunity at both the motion to dismiss and the summary judgment stage, that "successive pretrial assertions of immunity seem to be a rare occurrence"); *Johnson v. Jones*, 515 US 304, 319 (1995) (explaining that "our holding here has been the law in several Circuits for some time," yet "petitioners have not pointed to concrete examples of unmanageability they fear"). The Second Circuit has permitted immediate appeals of attorney sanctions orders for more than fifteen years (*see Cheng v. GAF Corp.* 713 F.2d 886 (2d Cir. 1983)), but according to our research only eight such appeals have ever been brought in that court.[9] In the Seventh Circuit, five appeals have been brought in fifteen years.[10] In the Ninth Circuit, nine appeals have been brought in over twenty years.[11] Even fewer appeals were brought in the

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[9] *Lapidus v. Vann*, 112 F.3d 91 (1997); *Satcorp International Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3 (1996); *McDraw v. CIT Group Equipment Financing, Inc.* 73 F.3d 1253 (1996); *Morley v. CIBA-Geigy Corp.*, 66 F.3d 21 (1995); *Discon v. Nynex.*, 4 F.3d 130 (1993); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682 (1989); *Sanko Steamship Co. v. Galin*, 835 F.2d 51 (1987); *Cheng v. GAF Corp.* 713 F.2d 886 (1983).

[10] *Serritella v. Markum*, 119 F.3d 506 (7th Cir. 1997); *Cleveland Hair Clinic v. Puig*, 104 F.3d 123 (7th Cir. 1997); *Kotsilieris v. Chalmers*, 966 F.2d 1181 (7th Cir. 1992); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Knorr Brake Corp v. Harbil, Inc.*, 738 F.2d 223 (7th Cir. 1984).

[11] *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (1995); *Telluride Mgmt. Solutions v. Telluride Inv. Group*, 55 F.3d 463 (1995); *Mark Indus. v. Sea Captain's Choice*, 50 F.3d 730 (1995); *Riverhead Sav. Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109 (1990) (rev'd in part, dismissed in part); *Aetna Life*

remaining circuits in which they are permitted. *See generally infra* n. 13 (collecting cases).

Immediate appeals by attorneys no longer participating in the case are, necessarily, even more rare. So far as our research reviews, in addition to this case, only eight such appeals have ever been brought.[12] It is difficult to see how this exceptionally small class of appeals can be said to undermine orderly judicial administration.

It is not at all surprising that appeals of sanctions orders are rare: attorneys have substantial incentives to appeal only those sanctions orders most deserving of further review. The great majority of district court orders imposing sanctions go unpublished and therefore do not draw the attention of peers and potential clients. But once the matter is taken on appeal, the court of appeals' opinion will be available in the federal reports or at least through on-line research services. A decision affirming such a sanction can be personally and professionally devastating. Unless the attorney is confident that an injustice

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Ins. Co. v. Alla Medical Servs., 855 F.2d 1470 (1988); *Optyl Eyewear Fashion Int'l Corp. v. Style Co.*, 760 F.2d 1045 (9th Cir. 1985); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 747 F.2d 1303 (1984); *Kordich v. Marine Clerks Assoc.*, 715 F.2d 1392 (1983); *David v. Hooker*, 560 F.2d 412 (1977).

[12] *Law v. National Collegiate Athletic Assoc.* 134 F.3d 1025 (10th Cir. 1998); *Walker v. Housing Authority of Dallas*, 129 F.3d 831 (5th Cir. 1997); *Peterson v. BMI Refractories*, 124 F.3d 1386 (11th Cir. 1997); *DeSisto College, Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989); *Glaser v. Cincinnati Milacron, Inc.*, 808 F.2d 285 (3d Cir. 1986); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985); *Wheeler v. Anchor Continental, Inc.*, 622 F.2d 94 (4th Cir. 1980); *David v. Hooker*, 560 F.2d 412 (9th Cir. 1977).

has occurred in the district court, she is quite unlikely to take the matter on appeal.

Experience also shows that immediate appeals of attorney sanctions orders consistently have corrected district court errors. In more than two-thirds of such cases, the court of appeals reversed or vacated the attorney sanction in whole or in part.[13] Without immediate review, the attorneys in those cases

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[13] The court of appeals reached the merits and reversed or vacated the award of sanctions in whole or part in the following cases. *Law v. National Collegiate Athletic Assoc.* 134 F.3d 1025 (10th Cir. 1998); *Walker v. Housing Authority of Dallas*, 129 F.3d 831 (5th Cir. 1997); *Peterson v. BMI Refractories*, 124 F.3d 1386 (11th Cir. 1997); *Lapidus v. Vann*, 112 F.3d 91 (2d Cir. 1997); *Satcorp International Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3 (2d Cir. 1996); *McDraw v. CIT Group Equipment Financing, Inc.*, 73 F.3d 1253 (2d Cir. 1996); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (9th Cir. 1995); *Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group*, 55 F.3d 463 (9th Cir. 1995); *Mark Indus. v. Sea Captain's Choice, Inc*, 50 F.3d 730 (9th Cir. 1995); *Chaves v. M/V Medina Star*, 47 F.3d 153 (5th Cir. 1995); *Discon v. Nynex.*, 4 F.3d 130 (2d Cir. 1993); *Kotsilieris v. Chalmers*, 966 F.2d 1181 (7th Cir. 1992); *Riverhead Savings Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109 (9th Cir. 1990); *Aetna Life Ins. Co. v. Alla Medical Servs., Inc.*, 855 F.2d 1470 (9th Cir. 1988); *Sanko Steamship Co. v. Galin*, 835 F.2d 51 (2d Cir. 1987); *Glaser v. Cincinnati Milacron, Inc.*, 808 F.2d 285 (3d Cir. 1986); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985); *Knorr Brake Corp v. Harbil, Inc.*, 738 F.2d 223 (7th Cir. 1984); *Cheng v. GAF Corp.* 713 F.2d 886 (2d Cir. 1983).

The court of appeals reached the merits and affirmed the award of sanctions in the following cases. *Serritella v. Markum*, 119 F.3d 506 (7th Cir. 1997); *Morley v. CIBA-Geigy Corp.*, 66 F.3d 21 (2d Cir. 1995); *Crookham v. Crookham*, 914 F.2d 1027 (8th Cir. 1990); *DeSisto College, Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989); *Thomas E. Hoar, Inc v. Sara Lee Corp.*, 882 F.2d 682 (2d Cir. 1989); *Ortho Pharmaceutical Co. v. Sona Distributors*, 847 F.2d 1512 (11th Cir. 1988); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Optyl*

would have been required to pay sanctions immediately, and the sanctions would have remained uncorrected potentially for *years* as the litigation continued in the district court.

Nor do appeals of sanction awards against attorneys impose adverse effects upon the district court. As the Court explained in a related context, "deeming" the sanction and merits to be separate "does not render the [sanctions] appeal more disruptive of ongoing proceedings, more likely to eliminate a trial judge's opportunity for reconsideration, more susceptible to being mooted by settlement, or in any way (except nominally) a more piecemeal enterprise." *Budinich v. Becton Dickinson & Co.*, 486 US 196, 202 (1988) (holding that requests for attorney's fees are collateral to the merits of the underlying case). In addition, an appeal of an attorney sanctions order does not result in a stay of district court proceedings. *Compare, e.g., Richardson-Merrell, Inc. v. Koller*, 472 US 424 (1985) (holding attorney disqualification orders nonappealable because, *inter alia*, they generally lead district courts to stay the underlying proceedings). Thus, neither the majority below nor Respondent has identified any detrimental effect from Petitioner's appeal on the progress of the underlying case, which proceeded unabated to final judgment.[14]

Eyewear Fashion Int'l Corp. v. Style Co., 760 F.2d 1045 (9th Cir. 1985); *David v. Hooker*, 560 F.2d 412 (9th Cir. 1977).

[14] Even if the court of appeals was correct in holding that it lacked jurisdiction over Petitioner's appeal, it nonetheless should have asserted jurisdiction under FRAP 4(a)(2). The Sixth Circuit concluded that Petitioner should have appealed from the final judgment rather than the earlier sanctions order. In other words, Petitioner appealed to early. But Rule 4(a)(2) is intended precisely to accommodate notices of appeal filed early and in good faith. "A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry."

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Sixth Circuit in this case be reversed.

Respectfully submitted,

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Here, Petitioner filed her notice of appeal in absolute good faith based on the overwhelming majority rule that an immediate appeal is permissible. The Sixth Circuit easily could have deemed Petitioner's appeal to be timely filed from the final judgment under Rule 4(a)(2) without any disruption of either the district court or appellate proceedings. There is no reason at all to construe the Rules of Appellate Procedure in order to defeat Petitioner's right to appeal. *Accord Firstier Mortgage Co. v. Investor Mortgage Ins. Co.*, 498 US 269 (1991) (although noting on the facts of that case that Rule 4(a)(2) applies "only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment," emphasizing that the "litigant's confusion [was] understandable" and that "[l]ittle would be accomplished by prohibiting the court of appeals from reaching the merits of such an appeal.").